Public Prosecutor v Selvarajoo a/l Ramachandran & Ors

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO MT(5)42–11 OF 2006
HUE SIEW KHENG JC
29 OCTOBER 2008

Criminal Law — Prevention of Corruption Act 1961 — s 14 — Policeman soliciting gratification — Facts to be proved — Presumption that gratification received corruptly — Whether defence rebutted presumption — Prevention of Corruption Act 1961 s 14

Criminal Law — Prevention of Corruption Act 1961 — s 18 — Whether witnesses were accomplices — Whether witnesses to be presumed to be unworthy of credit

Criminal Procedure — Trial — Duty of court — Failure by trial judge to consider all evidence adduced — Whether failure to observe provisions of s 173(m)(i) of the Criminal Procedure Code amounted to misdirection in law — Criminal Procedure Code s 173(m)(i)

Evidence — Statement — Cautioned statement — Whether exculpatory cautioned statements of accused were evidence of facts stated therein — Whether could be regarded as substantial evidence to show consistency or corroborate accused's version

Three charges under ss 3(a)(ii) and 4(a) of the Prevention of Corruption Act 1961 ('the Act') were preferred against the three respondents. The prosecution's case was that on the night of 27 August 1997 at around 9.30pm, the three respondents while on crime prevention patrol, had stopped a car driven by one Suroso bin Sukani ('SP4') who was with his wife ('SP7'), both of Indonesian descent. The couple had just left a construction site where they worked. On searching the vehicle, six Indonesian SPLP passports were found in the boot of the car. Suspecting the passports to be false, the respondents started questioning SP4 and SP7. SP4 then telephoned SP3, the owner of the car and SP3 came to the construction site. SP4 claimed that the three respondents then demanded a sum of RM10,000 to close the case. According to SP4, the police party eventually left the scene upon payment of RM4,000, around 11pm. At the close of the prosecution's case, the learned

sessions court trial judge acquitted and discharged the three respondents. On appeal by the prosecution, the High Court set aside the order of acquittal and discharge and the trial judge was directed to call for the defence. The respondents denied that there was ever any demand for gratification. They claimed that they did not receive any gratification and had released SP3, SP4 and SP7 without taking any further action after listening to SP3's explanation. At the close of the defence case, the trial judge acquitted and discharged the respondents after ruling that the defence had created a reasonable doubt in the prosecution's case. The prosecution appealed once again. The issues raised by the prosecution were, inter alia: (i) whether the statutory presumption under s 14 of the Act should be invoked; and (ii) whether the defence was a bare denial or an afterthought.

Held, allowing the appeal:

(1) The court had already made its findings that a prima facie case had been made out on all three charges against the respondents at the close of the prosecution's case. The court found that SP3, SP4 and SP7 were not accomplices and that s 18 of the Act applied. Hence these witnesses were persons who should not be presumed to be unworthy of credit. The learned judicial commissioner had also found no material contradictions in their evidence that rendered them wholly unreliable (see para 26).

(2) It was incumbent upon the trial judge to invoke the statutory presumption under s 14 of the Act. The court had already found it to be proved that: (i) the respondents were agents of the Government of Malaysia; and (ii) that the gratification had been accepted by the respondents. Applying the principle laid down in *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 the presumption was raised that the gratification was accepted corruptly as an inducement or reward to refrain from taking action against SP3 for the alleged offence. The burden imposed on an accused to rebut the presumption is that of a party to a civil case to prove his case on a balance of probabilities (see paras 28–29); *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 followed, *Public Prosecutor v Gurbachan Singh* [1964] MLJ 141 and *Thavanathan a/l Bala Subramaniam v Public Prosecutor* [1997] 2 MLJ 401 referred.

(3) Exculpatory cautioned statements of the respondents, which were not evidence of the facts stated therein, could not be regarded as substantial evidence that could be relied upon by the defence not only to show consistency but also corroborate the respondents' version. The trial judge in accepting that the evidence of the respondents was corroborated by their respective cautioned statements had clearly fallen

into serious error (see paras 38–39); *Public Prosecutor v Mansor Md Rashid & Anor* [1997] 1 CLJ 233 followed.

(4) At the end of the trial, s 173(m)(i) of the Criminal Procedure Code ('CPC') imposes a duty on the trial court to consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt. The trial judge had overlooked the provisions of s 173(m)(i) of the CPC as she had not considered at all the prosecution's evidence as led through SP3, SP4 and SP7 that the respondents had demanded for and accepted gratification from them to close the case (see paras 42 & 53).

(5) The prosecution had proved its case beyond reasonable doubt against all three respondents on all the three charges. Thus, the respondents were sentenced to a term of imprisonment of three months and fined RM5,000 in default five months imprisonment for the first charge, imprisonment of one month for the second charge and imprisonment of three months for the third charge; all sentences to run concurrently. In corruption cases public interest demands a deterrent sentence. However, since this case had taken almost ten years because of the two appeals lodged, some restraint and leniency was to be exercised (see paras 66 & 69).

[Bahasa Malaysia summary

Ketiga-tiga pertuduhan di bawah ss 3(a)(ii) dan 4(a) Akta Pencegahan Rasuah 1961 ('Akta') dibuat terhadap ketiga-tiga responden. Kes pendakwaan adalah bahawa pada malam 27 Ogos 1997 lebih kurang pukul 9.30 malam, ketiga-tiga responden semasa membuat rondaan penjegahan jenayah, telah memberhentikan sebuah kereta yang dipandu oleh Suroso bin Sukani ('SP4') bersama isterinya ('SP7'), kedua-duanya berbangsa Indonesia. Pasangan itu baru sahaja meninggalkan tapak pembinaan di mana mereka bekerja. Setelah memeriksa kenderaan itu, enam pasport SPLP Indonesia dijumpai dalam but kereta. Berasa syak pasport-pasport tersebut adalah palsu, responden-responden mula menyoal SP4 dan SP7. SP4 kemudian telah menelefon SP3, pemilik kereta itu dan SP3 datang ke tapak pembinaan tersebut. SP4 mendakwa bahawa ketiga-tiga responden kemudian menuntut sejumlah RM10,000 untuk menutup kes tersebut. Menurut SP4, pihak polis akhirnya meninggalkan tempat kejadian setelah dibayar RM4,000, lebih kurang pukul 11pm. Pada penutup kes pendakwaan, hakim perbicaraan mahkamah sesyen telah membebaskan dan melepaskan ketiga-tiga responden. Atas rayuan oleh pihak pendakwaan, Mahkamah Tinggi telah mengetepikan perintah pembebasan dan pelepasan dan hakim perbicaraan diarahkan memanggil pembelaan. Responden-responden telah menafikan bahawa terdapat apa-apa tuntutan suapan. Mereka mendakwa bahawa

mereka tidak menerima apa-apa suapan dan telah melepaskan SP3, SP4 dan SP7 tanpa mengambil apa-apa tindakan selanjutnya, setelah mendengar penjelasan SP3. Di penutup kes pembelaan, hakim perbicaraan telah membebaskan dan melepaskan responden-responden tersebut selepas memutuskan bahawa pihak pembelaan telah membangkitkan keraguan yang munasabah dalam kes pihak pendakwaan. Pihak pendakwaan telah merayu sekali lagi. Isu-isu yang ditimbulkan oleh pihak pendakwaan adalah, antara lain: (i) sama ada anggapan statutori di bawah s 14 Akta patut digunakan; dan (ii) sama ada pembelaan hanya merupakan penafian kosong atau sesuatu yang difikirkan kemudian.

Diputuskan, membenarkan rayuan:

(1) Mahkamah telahpun membuat penemuannya bahawa kes prima facie telah dibuktikan terhadap ketiga-tiga pertuduhan terhadap responden-responden di penutup kes pendakwaan. Mahkamah mendapati bahawa SP3, SP4 dan SP7 bukanlah rakan sejenayah dan bahawa s 18 Akta telah digunapakai. Justeru itu saksi-saksi tersebut merupakan orang-orang yang tidak patut dianggap sebagai tidak boleh dipercayai. Pesuruhjaya kehakiman yang bijaksana juga mendapati tiada percanggahan penting dalam keterangan mereka yang membuatkan mereka tidak boleh dipercayai langsung (lihat perenggan 26).

(2) Adalah kewajipan hakim perbicaraan untuk menggunapakai andaian statutori di bawah s 14 Akta. Mahkamah telahpun mendapati ia dibuktikan bahawa: (i) responden-responden merupakan ejen-ejen Kerajaan Malaysia; dan (ii) bahawa suapan itu telah diterima oleh responden-responden. Dengan menggunakan prinsip yang dinyatakan dalam kes *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 andaian itu ditimbulkan bahawa suapan telah diterima secara sogokan sebagai pendorong atau ganjaran untuk menghalang daripada mengambil tindakan terhadap SP3 kerana kesalahan yang didakwa. Beban yang diletakkan atas tertuduh untuk mematahkan andaian itu adalah bahawa pihak kepada kes sivil untuk membuktikan kesnya atas imbangan kebarangkalian (lihat perenggan 28–29); *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 diikut, *Public Prosecutor v Gurbachan Singh* [1964] MLJ 141 dan *Thavanathan a/l Bala Subramaniam v Public Prosecutor* [1997] 2 MLJ 401 dirujuk.

(3) Kenyataan beramaran melepaskan responden-responden, yang bukan keterangan fakta yang dinyatakan di sini, tidak boleh dianggap sebagai keterangan penting yang boleh digunakan oleh pihak pembelaan bukan hanya untuk menunjukkan kekonsistenan tetapi juga menyokong versi responden-responden. Hakim perbicaraan dalam menerima bahawa keterangan responden-responden disokong oleh kenyataan beramaran

mereka telah membuat kesilapan serius (lihat perenggan 38–39); *Public Prosecutor v Mansor Md Rashid & Anor* [1997] 1 CLJ 233 diikut.

(4) Di akhir perbicaraan, s 173(m)(i) Kanun Prosedur Jenayah ('KPJ') meletakkan kewajipan ke atas mahkamah perbicaraan untuk mempertimbangkan semua keterangan yang dikemukakan di hadapannya dan hendaklah memutuskan sama ada pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Hakim perbicaraan terlepas perhatian terhadap peruntukan s 173(m)(i) KPJ kerana beliau tidak langsung mempertimbangkan keterangan pihak pendakwaan yang dikemukakan melalui SP3, SP4 dan SP7 bahawa responden-responden telah menuntut dan menerima suapan daripada mereka untuk menutup kes (lihat perenggan 42 & 53).

(5) Pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah terhadap ketiga-tiga responden atas ketiga-tiga pertuduhan. Oleh itu, responden-responden telah dihukum penjara selama tiga bulan dan didenda RM5,000 dan sekiranya gagal membayar denda akan dipenjarakan selama lima bulan untuk pertuduhan pertama, dipenjarakan sebulan untuk pertuduhan kedua dan dipenjarakan tiga bulan untuk pertuduhan ketiga; kesemua hukuman hendaklah berjalan serentak. Dalam kes-kes rasuah kepentingan awam menuntut hukuman pencegahan. Walau bagaimanapun, memandangkan kes ini telah mengambil masa hampir sepuluh tahun sebelum dua rayuan dibuat, beberapa sekatan dan kelonggaran perlu dilaksanakan (lihat perenggan 66 & 69).]

Notes

For cases on cautioned statement, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2385–2402.

For cases on duty of court, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4753–4756.

For cases on s 14 of the Prevention of Corruption Act 1961, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2829–2843.

For cases on s 18 of the Prevention of Corruption Act 1961, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2849–2851.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chua Beow Huat v PP [1970] 2 MLJ 29, HC (folld)
DA Duncan v PP [1990] 2 MLJ 195, FC (refd)
Hamidon bin Mat Yatim v PP [1995] 3 CLJ 724, HC (folld)
Ku Yahya Ku Bahari & Anor v PP [2000] 3 CLJ 162, HC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Ng Kok Lian & Anor v PP [1983] 2 MLJ 379; [1983] 2 CLJ 247, FC (refd)
PP v Chan Kim Choi [1989] 1 MLJ 404, HC (refd)

PP v Gurbachan Singh [1964] MLJ 141, HC (refd)
PP v Ku Lip See [1981] 1 MLJ 258, HC (refd)
PP v Ku Yahya Ku Bahari & Anor [2002] 1 CLJ 113, CA (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324, HC (refd)
PP v Mansor bin Md Rashid & Anor [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (folld)
PP v Mohd Radzi Abu Bakar [2006] 1 CLJ 457, FC (refd)
PP v Selvarajoo a/l Ramachandran & Ors [2005] 5 MLJ 282; [2005] 6 CLJ 114, HC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (folld)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (refd)
Thavanathan a/l Bala Subramaniam v PP [1997] 2 MLJ 401, SC (refd)

Legislation referred to
Criminal Procedure Code s 173(f)(i), (m)(i)
Prevention of Corruption Act 1961 ss 3(a)(ii), 4(a), 14, 18

Mohd Asnawi (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Ibrahim Hashim (Hassan Ibrahim with him) (Hassan Ibrahim & Co) for the respondents.

Hue Siew Kheng JC:

BACKGROUND

[1] Three charges under s 3(a)(ii) and s 4(a) of the Prevention of Corruption Act 1961 ('the Act') were preferred against the three respondents. At the close of the prosecution case, the learned sessions court judge (the trial judge) acquitted and discharged the three respondents of all charges as the trial court found that the prosecution had not made out a prima facie case on the charges.

[2] On appeal by the public prosecutor, this court set aside the order of acquittal and discharge and the trial judge was directed to call for the defence of the respondents on the three charges (see *Public Prosecutor v Selvarajoo a/l Ramachandran & Ors* [2005] 5 MLJ 282; [2005] 6 CLJ 114).

[3] At the close of the defence case, the trial judge acquitted and discharged the respondents after ruling that the defence had created a reasonable doubt in the prosecution case.

A **[4]** The public prosecutor appealed once again.

[5] Upon hearing the appeal, I allowed the appeal and accordingly, set aside the acquittal and discharge order of the sessions court and substituted it with a finding of guilt and convicted the respondents on the charges preferred against them.

[6] The charges were as follows:

First Charge

Bahawa kamu bersama-sama pada 27 Ogos 1997, di antara jam 9.30 malam hingga 10.30 malam, di tapak projek perumahan Taman Sri Alam Masai, dalam Daerah Johor Bahru Tengah, dalam Negeri Johor sebagai agen-agen Kerajaan Malaysia iaitu KOPERAL 103713 SELVARAJOO A/L RAMACHANDRAN, KOPERAL 88450 CHANDRAN A/L KRISHNAN dan LAN KOPERAL 100164 RASINDRAN A/L KARUPPIAH telah secara rasuah memujuk rayu untuk diri kamu satu suapan, iaitu wang tunai RM10,000/- daripada Suroso bin Sukani sebagai dorongan untuk tidak melakukan suatu perbuatan berhubung dengan hal ehwal prinsip kamu, iaitu tidak mengambil tindakan ke atas Suroso bin Sukani yang dikatakan memiliki 6 paspot rakyat Indonesia yang disyaki palsu serta melindungi mereka, dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 3(a)(ii) Akta Pencegah Rasuah 1961 yang boleh dihukum di bawah seksyen 3 Akta yang sama.

Second Charge

Bahawa kamu bersama-sama pada 27 Ogos 1997, pada jam 11 malam, di tapak projek perumahan Taman Sri Alam Masai, dalam Negeri Johor, sebagai agen-agen Kerajaan Malaysia iaitu KOPERAL 103713 SELVARAJOO A/L RAMACHANDRAN, KOPERAL 88450 CHANDRAN A/L KRISHNAN dan LAN KOPERAL 100164 RASINDRAN A/L KARUPPIAH telah secara rasuah menerima untuk diri kamu satu suapan, iaitu wang tunai RM1,000/- daripada Khairul Anam bin Mohd. Toha sebagai dorongan untuk tidak melakukan suatu perbuatan berhubung dengan hal ehwal prinsip kamu, iaitu tidak mengambil tindakan ke atas Khairul Anam bin Mohd Toha yang dikatakan memiliki 6 paspot rakyat Indonesia yang disyaki palsu dan melindungi mereka, dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 4(a) Akta Pencegah Rasuah 1961 yang boleh dihukum di bawah Seksyen yang sama.

Third Charge

Bahawa kamu bersama-sama pada 27 Ogos 97, pada jam 11 malam, di tapak projek perumahan Taman Sri Alam Masai, dalam Negeri Johor, sebagai agen-agen Kerajaan Malaysia iaitu KOPERAL 103713 SELVARAJOO A/L RAMACHANDRAN, KOPERAL 88450 CHANDRAN A/L KRISHNAN dan LAN KOPERAL 100164 RASINDRAN A/L KARUPPIAH telah secara rasuah menerima untuk diri kamu satu suapan, iaitu wang tunai RM3,000/- daripada Suroso bin Sukani sebagai dorongan untuk tidak mengambil tindakan ke atas

Suroso bin Sukani yang dikatakan memiliki 6 paspot rakyat Indonesia yang disyaki palsu dan melindungi mereka, dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 4(a) Akta Pencegah Rasuah 1961 yang boleh dihukum di bawah Seksyen yang sama.

[7] The facts of the case have been succinctly summarised by my learned brother judge in *Public Prosecutor v Selvarajoo*. Nevertheless, for ease of reference a truncated version is set out below.

[8] The prosecution case was that on the night of 27 August 1997 at around 9.30pm the three respondents together with one Koperal Abdul Nasir (SP6) were on crime prevention patrol in the vicinity of Taman Sri Alam, Masai, Johor. SP6 was the driver of the patrol car, a station wagon bearing registration No WBN 2378.

[9] Shortly thereafter, they stopped a Honda Civic which was being driven by one Suroso bin Sukani (SP4) who was with his wife (SP7), both of Indonesian descent. The couple had just left a construction site where they worked (he as a construction worker whilst she ran the canteen there) with the intention of going to a nearby town.

[10] On searching the vehicle, six Indonesian SPLP passports were found in the boot of the car. Suspecting the passports to be false, the respondents started questioning SP4 and SP7. SP4 informed them that the Honda Civic belonged to one Khairil Anuar bin Mohd Toha, (SP3) a relative and that earlier that evening, SP4 had swapped his car, a Proton Wira, for SP3's Honda Civic.

[11] His disavowal of all knowledge of the existence of the passports went unheeded. According to SP4, the three respondents then demanded a sum of RM10,000 to close the case ('tutup kes'). He then called SP3 on his handphone, urging him to return to the construction site to settle the matter with the police. SP3 arrived more than ½ hour later in SP4's Proton Wira, together with his companion, one Milan bt Rosli. SP3 testified he tried to convince the appellants as to the authenticity of the passports, explaining that the passports had been entrusted to him by his employer to apply for work permits for the passport holders.

[12] The respondents turned a deaf ear to his explanation; instead they threatened SP3 and his relatives with arrest and detention of the two vehicles ie the Honda Civic and Proton Wira if their demand for money was not met. The police party eventually left the scene upon payment of RM4,000, around 11pm.

[13] The alleged offences were, according to the charges, committed on 27 August 1997. Hence, the standard of proof on the prosecution at the close of its case is as set out in s 173(f)(i) (as amended) of the Criminal Procedure Code (CPC) which is as follows:

> (i) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused.

[14] As laid down by Augustine Paul JCA (as he then was) in delivering the judgment of the Federal Court in *Balachandran v Public Prosecutor* [2005] 1 CLJ 85:

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal.

[15] It is settled law that at the close of the prosecution case, there must be a maximum evaluation of all the evidence led by the prosecution (see *Public Prosecutor v Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734; *Balachandran v Public Prosecutor*.

[16] In holding that the prosecution had failed to establish a prima facie case against the respondents, the trial judge found, inter alia, that as SP3, SP4 and SP7 had actively participated in the alleged corrupt transaction they were therefore accomplices. Their evidence, as such, had to be corroborated and she could find no independent corroboration of their evidence in respect of the alleged corrupt solicitation and receipt of the gratification as per the three charges. She went on to rule that s 18 of the Act did not protect them.

[17] Allowing the appeal by the public prosecutor, Azahar Mohamed JC (as he then was), in determining the issue of whether SP3, SP4 and SP7 were accomplices, relied on the dicta of Salleh Abas CJ (Malaya) (as he then was) in the case of *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379; [1983] 2 CLJ 247, in particular the following:

> Thus in every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his actus reus. The whole idea is completely contrary to the basic concept of criminal liability.

[18] His Lordship then embarked on a thorough evaluation of the circumstances in which these witnesses gave the money to the respondents (see pp 292–293 (MLJ); pp 120–121 (CLJ) of *Public Prosecutor v Selavarajoo*). He concluded that: A

> After scrutinising all their evidence in its proper perspective and in the appropriate context, it is clear to me that PW3, PW4, PW7 were not willing participants in giving the money to the respondents. It is clear to me that they had no choice and that they only finally agreed to pay because of the pressure put on them by the respondents. In the circumstances of this case, faced with the respondents' demand and threat they had little choice but accede to their demand. To my mind, these witnesses did not offer the bribe but it was the respondents who took the initiative by demanding the money from them. In the circumstances, I am of the view that these witnesses were not accomplices. In my view, these are important considerations, which the learned sessions court judge ought to have taken into consideration. Nowhere in her grounds of judgment did the learned sessions court judge direct her attention to this point. This is a failure of justice. The learned sessions court judge was in serious error to ignore and to overlook the evidence that I have adverted to earlier, and as the result of the error she had arrived at a wrong decision having regard to the entire evidence. B C D

[19] Furthermore, as he found no material contradiction in the evidence of these witnesses which rendered their evidence wholly unreliable, he held that the trial judge had also erred in ruling that s 18 of the Act did not apply. E

[20] Having thoroughly studied the judgment of the learned judicial commissioner, the appeal record and the submissions tendered I fully concur with all the findings made by His Lordship in the said judgment and the decision he arrived at. F

[21] Upon being called to enter into their defence by the trial judge all three respondents elected to testify. The trial judge summarised their evidence as follows: G

> They did not dispute that they were on duty and had stopped and searched the Honda Civic on the night in question. They explained that they had stopped the car because 'kereta keluar dari tapak pembinaan dengan guna kereta yang mewah'. Whereupon they searched the car and found the passports. When it was difficult to continue with the search, they directed PW4 and PW7 to move the car some 100–150 meters away to a place which was fairly well lit. There, they continued the search. H
>
> They then questioned PW4 who told them that the car belonged to PW3. At this juncture, they requested PW4 to require PW3 to come there to verify his claim. About 45 minutes later, PW3 came with an Indonesian friend and explained that the car and the passports belonged to his boss. They were satisfied with his explanation and released all the parties and the car. I

A They vehemently denied having solicited or receiving a bribe. When asked to explain if they knew why PW4 and PW7 falsely accuse them of the charges if indeed they were innocent, the first accused alleged that it could be because PW7 was not satisfied with the manner in which the search had been conducted. He said she had said. 'Kamu menghina kami periksa depan orang-orang'.

B

[22] At the close of defence, the trial judge acquitted and discharged the respondents holding that the defence had created a reasonable doubt in the prosecution case. Her judgment is to be found in pp 33–43 of the *rekod rayuan*.

C

[23] Having read the notes of evidence, the grounds of judgment of the trial judge, the appeal record, the submissions of both the appellant and the respondents, and the applicable law, this court is of the considered view that this is an appropriate case for interfering with the findings of fact arrived at by the trial judge as:

D

> It is the duty of the appellate court to intervene in a case where the trial court had fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion (see *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545).

E

[24] The prosecution has raised seven grounds of appeal. In my view, these can be conveniently summarised as follows:

F

(1) Whether the statutory presumption under s 14 of the Act should be invoked; and

(2) Whether the defence is a bare denial or an afterthought.

G

Statutory presumption under s 14 of the Act

Section 14 of the Act provides:

> Where in any proceedings against a person for an offence under section 3 or 4 it is proved that any gratification has been paid or given to or received by a person in the employment of any public body, that gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned, unless the contrary is proved.

H

I

[25] As laid down in *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89, where a defendant is charged with an offence under s 4(a) of the Prevention of Corruption Act 1961, to which s 14 also applied, the onus lies upon the prosecution to prove the first two factual ingredients of the offence, viz (a) that a gratification was paid or given to or received by the defendant; and (2)

that at the same time of the payment, gift or receipt, he was in the employment of a public body. Upon proof of these two ingredients, the existence of the third ingredient, viz (3) that the gratification was paid or given or received corruptly as an inducement or reward for doing or forbearing to do an act in relation to the affairs of that public body is to be presumed unless the contrary is proved.

[26] In this case, this court had already made its findings that a prima facie case had been made out on all three charges against the respondents at the close of the prosecution case. The main issue, as found by this court, namely whether SP3, SP4 and SP7 were accomplices had been thoroughly addressed and this court had found that they were not accomplices and that s 18 of the Act applied: hence these witnesses were persons who should not be presumed to be unworthy of credit. The learned judicial commissioner had also found no material contradictions in their evidence that rendered them wholly unreliable.

[27] Consequently, this court found that:

> Based on the evidence of PW3, PW4 and PW7 it has been proved that all the respondents had solicited gratification from PW4 as an inducement to the respondents not to initiate action against PW4 who was alleged to have in his possession six forged Indonesian citizen passports and for sheltering them. In regard to the second charge under s 4(a) of the Act, based on the evidence of PW3, PW4 and PW7 it has been proved that all the respondents had accepted gratification, a sum of RM1,000 from PW3 for an alleged offence of possession of 6 forged Indonesian citizens passports and for sheltering them. In regard to the third charge under s 4(a) of the Act, based on the evidence of PW3, PW4 and PW7 it has been proved that all the respondents had accepted gratification, a sum of RM3,000 from PW4 as an inducement to refrain them from taking action against PW4 for an alleged offence of possession of six forged Indonesian citizen passports and for sheltering them (at p 124).

[28] In view of the finding of the court as set out above, it was incumbent upon the trial judge to invoke the statutory presumption under s 14 of the Act. The submission of the learned defence counsel that the presumption under s 14 cannot be raised because of the 'doubt' as to the identify of the accused and the failure to call certain witnesses cannot stand and is misconceived as the court had already found it to be proved that (i) the respondents were agents of the Government of Malaysia and (ii) that the gratification had been accepted by the respondents. Applying the principle laid down in *Public Prosecutor v Yuvaraj* the presumption is raised that the gratification was accepted corruptly as an inducement or reward to refrain from taking action against SP3 for the alleged offence.

[29] It is a well-settled principle of law that the burden imposed on an accused to rebut the presumption is that of a party to a civil case to prove his case on a balance of probabilities (see *Public Prosecutor v Yuvaraj*, *Public Prosecutor v Gurbachan Singh* [1964] MLJ 141; *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401).

[30] As explained in *Ku Yahya Ku Bahari & Anor v Public Prosecutor* [2000] 3 CLJ 162 (which was affirmed by the Court of Appeal in *Public Prosecutor v Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113):

> When the prosecution is minded in invoking the presumption then the particular burden of proof, as opposed to the general burden, shifts to the defence to rebut such presumption on a balance of probabilities. This from a defence point of view is heavier than the burden of casting a reasonable doubt, but is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt.

[31] In applying the 'reasonable doubt' test the trial judge had obviously imposed on the defence a lighter burden and this, to my mind, amounts to a misdirection in law.

Is the defence a bare denial and an afterthought?

[32] The prosecution has submitted that as the court had held that a prima facie case had been made out, the evidence adduced can only be dislodged by evidence in rebuttal, citing *Balachandran v Public Prosecutor* in support. This, the prosecution said, the defence has failed to do as the defence is one of bare denial and an afterthought, which failed to cast any reasonable doubt on the prosecution case (see *DA Duncan v Public Prosecutor* [1990] 2 MLJ 195; *Public Prosecutor v Ku Lip See* [1981] 1 MLJ 258; *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324).

[33] Learned defence counsel contends that the defence has succeeded in casting a reasonable doubt as the respondents have given sworn testimony which is consistent with their cautioned statements which were tendered and were exculpatory.

[34] Distinguishing the present case from *Balachandran v Public Prosecutor* the defence has submitted as follows (at p 5/32 of the *Penghujahan Bertulis Responden*):

> Unlike in this case, the cautioned statement were tendered as exhibit (without prosecution objection) as (D-17, D-18 and D-19 at pp 37–98 of Rekod Rayuan – Bahagian I) at the defence stage and subject to cross-examinations therefore they are substantive evidence that can be relied upon by the defence not only to show consistency but also corroborate the respondent's version.

[35] It is clear that the trial judge accepted the defence submission on this point as she had said, as one of her four reasons for finding the defence had raised a reasonable doubt, the following:

> Thirdly, the evidence of the accused persons was corroborated by their respective cautioned statements which were recorded soon after their arrest (at p 42).

[36] In *Public Prosecutor v Mansor bin Md Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233, the Federal Court enunciated as follows:

> In relation to the use of the exculpatory statement of the first respondent (D25), we note that the learned trial judge had used the statement to conclude that Amran occupied room 'K' in the house. Learned counsel for the first respondent had also submitted before us that the first respondent's statement D25 showed that he (the first respondent) did not negotiate nor did he ask the second respondent to buy the cannabis. *With respect, we are of the view that the approach is wrong. A purely exculpatory or self-serving statement is not evidence of the facts stated though it may be admitted to show the reaction or attitude of the accused at the time when he made it.* (Emphasis added.)

[37] The Federal Court also referred to the Singapore case of *Public Prosecutor v Chan Kim Choi* [1989] 1 MLJ 464 where Coomaraswary J, speaking on the evidential status of exculpatory or self-serving statements, said (at p 413):

> What he says in order to exculpate himself cannot be admissible as the truth because it is self-serving and also because it is not necessarily consistent with other facts that may be established by the prosecution in the course of the trial.

[38] In light of the decision of the Federal Court in *Public Prosecutor v Mansor bin Md Rashid & Anor* it is clear the exculpatory cautioned statements of the respondents, which is not evidence of the facts stated therein, cannot be regarded as 'substantial evidence that can be relied upon by the defence not only to show consistency but also corroborate the respondent's version'.

[39] The trial judge in concurring with, and accepting that the evidence of the respondents was corroborated by their respective cautioned statements had clearly fallen into serious error.

[40] It is appropriate at this juncture to have a further look at the defence case. As already alluded to in the summary of the defence by the trial judge, the respondents did not dispute the following:

(a) they were at the scene that night;

(b) they were on crime prevention rounds;

(c) they stopped the Honda Civic and searched the car;

(d) they found the SPLP passports;

(e) they requested for SP3 to come to the scene upon being informed that the car and passports belonged to him; and

(f) they waited 40–45 minutes for SP3 to arrive at the scene.

[41] They, however, 'vehemently denied' that there was ever any demand for gratification as testified by SP3, SP4 and SP7, neither did they receive any gratification from them. What they did was, after listening to SP3's explanation when he finally turned up, release him and SP4 and SP7 without taking any action against them.

[42] At the end of the trial, s 173(m)(i) of the CPC imposes a duty on the trial court to consider *all the evidence adduced before it* and shall decide whether the prosecution has proved its case beyond reasonable doubt.

[43] The trial judge, as adverted to earlier, gave four reasons for her decision.

[44] Firstly, in response to the submission by the prosecution that the fact that the respondents had not requested for the registration card of the Honda Civic nor the employer of SP3 to come to the scene demonstrated that the respondent's intention in requiring SP3 to come to the place of incident was to demand for money she said this (at pp 41–42 of the *rekod rayuan*):

> In my judgment, the conduct of the accused persons in requiring PW3 to come to the scene does not reflect adversely on them as they had been informed by PW4 and PW7 that the car belonged to PW3. On the contrary, it was quite proper for them to require PW3 to come there to confirm the allegation of his brother and sister-in-law.
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> It is true that they did not ask for the registration card to be produced but this omission was not sufficient to draw an inference that the accused were not interested in ascertaining the owner of the car. In addition, there was the unchallenged evidence of the third accused that he had tried to phone the employer of PW3 but these calls went to voice-mail.

[45] With respect, the trial judge does not appear to have considered the fact that on that night the respondents were on crime prevention patrol, in full uniform and in an official patrol car with a sniffer dog in tow. In other words, they were on duty. And when they stopped the Honda Civic as it was coming out of the construction site, it was because they were suspicious as it was a 'kereta mewah'.

[46] Certainly no adverse inference can be drawn when they subsequently searched the car in the course of their duty. It was when the SPLP passports were discovered that the prosecution and defence version sharply differs.

[47] SP4 had testified that there was an initial demand for RM10,000 to close the case as the respondents claimed the SPLP passports to be false. When he pleaded with them that the car and passports belonged to SP3, his relative, he was allowed to call SP3 to come to the scene. By this time, they had moved from the place where they were initially stopped to the construction site which was brighter.

[48] The defence has denied that any demand was made by the respondents who had merely required the presence of SP3, as he was the alleged owner of the car and passports.

[49] When SP3 finally arrived a full 40–45 minutes later, they released him together with SP4 and SP7 after accepting his explanation that the car and passports belonged to his employer. A call to the employer which went into voice-mail was all the attempt made to contact the employer to verify SP3's information.

[50] The defence version raises many questions. Why should a police party on duty loiter around a construction site at night for the better part of an hour waiting for a potential suspect to turn up? And when he eventually turns up, to kindly let him go on his verbal information, *without more,* that the passports and car belonged to his employer.

[51] Leaving aside the question of why SP4 and SP7 were not brought to the police station upon discovery of the SPLP passports, which did not belong to them, for further investigation, the conduct of the respondents as revealed in their testimony beggars belief. There was no demand for documentary proof of ownership of the 'kereta mewah', which had initially aroused their suspicions. No real attempt was made to contact SP3's employer to verify the information given. No seasoned policemen like the respondents, having served for more than 15 years, would conduct themselves in this manner upon discovering a potential criminal offence ie being in possession of the SPLP passports being committed.

[52] In my view, the irresistible inference to be drawn from the conduct of the respondents in requiring SP3 to come to the scene was to pursue their demand for money. And for this, they were prepared to wait.

[53] With respect, the trial judge appears to have overlooked the provisions of s 173(m)(i) of the CPC as she has not considered at all the prosecution

A evidence as led through SP3, SP4 and SP7 that the respondents had demanded for, and accepted gratification from them to close the case.

[54] The second reason advanced by the trial judge is that SP7 had reasons to falsely accuse the respondents as she was unhappy about the manner in
B which she and her husband were stopped and searched by the respondents.

[55] This, the prosecution submit, is obviously an afterthought, citing *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29 and *Hamidon bin Mat Yatim v Public Prosecutor* [1995] 3 CLJ 724 in support.
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[56] I am in agreement with the prosecution in light of the authorities cited that the defence evidence that SP7 had said 'Kamu menghina kami periksa depan orang-orang' is an afterthought as SP7 was never cross-examined on this.
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[57] Besides, if the defence version is to be believed, why should SP7 harbour any ill feelings towards the respondents who had so magnanimously released them without any further action despite being found in possession of
E SPLP passports which did not belong to them?

[58] The fourth and final reason given presents an enigma: who is the gentleman that the trial judge is referring to? She said that 'when PW3 came to the scene he was accompanied by an Indonesian man' and in her view 'this
F gentleman who would have witnessed what transpired at the scene, was not called and neither was any evidence proferred for the omission'.

[59] There is nothing in evidence that PW3 came to the scene with an Indonesian man. PW3 said he came to the scene with his *teman*, one Milan,
G who was called and identified as Milan bt Rosli.

[60] The three respondents testified that SP3 came with a *kawan* but the gender was not disclosed.

H **[61]** Milan bt Rosli was offered to the defence at the close of the prosecution case.

[62] It is trite law that the discretion lies with the prosecution to call all
I such witnesses as are essential to the unfolding of the narrative on which the prosecution case is based.

[63] This particular witness was not called but offered because, as submitted by the prosecution, the unfolding of the narrative was sufficient through the evidence of SP3, SP4 and SP7.

[64] In the circumstances, I find that there is no basis for drawing an adverse inference against the prosecution for not calling this particular witness.

[65] I find that the reasons for the trial judge's decision are not supported by evidence or the law. As this court had already held that a prima facie case had been made out, the prosecution case can only be dislodged by evidence in rebuttal, which the defence has failed to do. Even applying the lighter burden on the defence of 'reasonable doubt', this court is of the considered view that no reasonable doubt has been raised as the defence is a bare denial and an afterthought.

[66] Consequently, upon considering all the evidence adduced, I find that the prosecution has proved its case beyond reasonable doubt against all three respondents on all the three charges.

[67] Based on the foregoing, the appeal was allowed. Accordingly, the order of acquittal and discharge was set aside and a finding of guilty and conviction entered against the respondents on all the charges.

SENTENCE

[68] Sections 3(a) and 4(a) of the Act carries a sentence of a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

[69] After hearing submissions on sentence from both the prosecution and the defence I imposed the following sentence:

(1) In respect of the first charge the respondents were sentenced to a term of imprisonment of three months and fined RM5,000 in default five months imprisonment.

(2) In respect of the second charge the respondents were sentenced to a term of imprisonment of one month.

(3) In respect of the third charge the respondents were sentenced to a term of imprisonment of three months. All sentences are to run concurrently.

[70] There is no denying that in corruption cases public interest demands a deterrent sentence.

A **[71]** However, in view of the background of this case, which had taken almost ten years because of the two appeals lodged this court is of the view that some restraint and leniency should be exercised and therefore passed the sentence as aforesaid.

B *Appeal allowed.*

Reported by Kanesh Sundrum

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